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STATE OF WASHINGTON

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NO. 82142-9

**SUPREME COURT
OF THE STATE OF WASHINGTON**

NANCY NGYUEN WAPLES

Appellant,

vs.

PETER H. YEE, et. al.,

Respondents.

**APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
The Honorable FREDERICK W. FLEMING, Judge
Cause No. 06-2-11015-9**

**REPLY BRIEF OF APPELLANT
NANCY NGYUEN WAPLES
TO AMICUS CURIAE OF THE
WASHINGTON DEFENSE TRIAL LAWYERS**

**GEORGE A. STEELE
Attorney for Appellant
WSBA NO. 13749**

**P.O. Box 2370
Shelton, WA 98584
(360) 426-2928**

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A. STATEMENT OF THE CASE

The facts of this case are not in any serious dispute and have already been recited in the Appellant's Court of Appeals Brief.

B. ASSIGNMENT OF ERROR

I.

The trial court erred in dismissing this case when the statute in question did not require strict compliance, the procedures for the mediation were not in effect at the time the case was filed, and RCW 7.70.100 treats one class of tortfeasor differently from other classes of tortfeasors.

C. ADDITIONAL ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- (1). Whether this court should follow the reasoning of *Amicus Curiae* Washington State Association for Justice Foundation, when RCW 7.70.100 clearly favors one class of alleged tortfeasors over other similarly situated tortfeasors and does nothing more than frustrate the right to access to the courts of those who have medical malpractice claims.
- (2). Whether this court should apply the analysis of *Amicus Curiae*, Washington State Association for Justice Foundation, despite the fact that a privileged and immunities objection was not specifically made in the trial court, when the issues involves the fundamental right to

equal treatment and access to the courts.

- (3). Whether RCW 7.70.150 is unconstitutional in light of Putman v. Wenatchee Valley Med. Ctr., 80888-1, decided by this court on September 17, 2009.

D. SUMMARY OF ARGUMENT

The Appellant reincorporates the arguments put forward in the Appellant's brief and Motion for Discretionary Review. In addition to the authority and arguments already cited in those materials, the Appellant is adopting the reasoning and arguments of the Washington State Association for Justice Foundation

E. ARGUMENT

I.

THE TRIAL COURT ERRED IN DISMISSING THIS CASE WHEN THE STATUTE IN QUESTION DID NOT REQUIRE STRICT COMPLIANCE, THE PROCEDURES FOR THE MEDIATION WERE NOT IN EFFECT AT THE TIME THE CASE WAS FILED, AND RCW 7.70.100 TREATS ONE CLASS OF TORTFEASER DIFFERENTLY FROM OTHER CLASSES OF TORTFEASERS.

1. This court should follow the reasoning of Amicus Curiae Washington State Association for Justice Foundation, when RCW 7.70.100

clearly favors one class of alleged tortfeasers over other similarly situated tort feasers and does nothing more than frustrate the right to access to the courts of those who have medical malpractice claims. The Appellant is adopting the authority and reasoning of the Amicus Curiae Brief of the Washington State Association of Justice Foundation. It is the Appellant's position that the issues raised in that brief, present additional reasons why this could should reverse the Court of Appeals and the Pierce County Superior Court.

The Appellant agrees that Article I, section 12, of the Washington State Constitution prohibits the conferring special privileged on certain classes of citizens, while infringing on the rights of others. See Grant County Fire Protection Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004). While the court found that the privileged and immunities clause was not violated in that case, it discussed the types of rights the clause dealt with. ". . . pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Constitutional Limitations (6th

ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution." Grant Fire Protection Dist. No. 5 v. City of Moses Lake, supra at 813.

Although the Appellant does not intend to parrot the entire argument stated in the Amicus Brief, it is clear that RCW 7.70.100 confers a small class of individual defendants in tort claims with special protections from being the subject of lawsuits. This is not a situation analogous to the State granting permission to be sued, where it would have the right to set the rules. This distinction was discussed in the very recent Washington Supreme Court decision of Putman v. Wenatchee Valley Med. Ctr., No. 80888-1. In striking down RCW 7.70.150, the court noted that medical malpractice cases were nothing more than negligence cases.

This is a situation where the State has chosen to infringe on the rights of private litigants with claims against a certain class of private litigants thus conferring special protections. The Appellant and others in her situation have now have a roadblock to their right to access to the courts. As argued in the amicus brief, RCW 7.70.100 does not require any dispute resolution; it does not impose any obligation on the alleged tortfeasor. It only makes it more difficult for a person with a medical malpractice claim to seek redress in the courts.

There would still be an issue of whether the appellant can avail herself of this issue, when it was not specifically raised in the trial court. That issue must be addressed as well.

2. This court should apply the analysis of Amicus Curiae, Washington State Association for Justice Foundation, despite the fact that a privileged and immunities objection was not specifically made in the trial court, when the issues involves the fundamental right to equal treatment and access to the courts. Generally, issues not raised in the trial court cannot be raised on appeal. There are exceptions, however. RAP 2.5. One of those exceptions is an error effecting a constitutional right. See State v. Jones, 117 Wn. App. 221, 70 P.3d 171 (2003). In that case the court dealt with the trial court not allowing the use of a twenty year old forgery conviction in cross-examination. The objection was based on the evidence rules. On appeal, the appellant raised a right of confrontation claim as well. In determining whether the appellant in that case should be able to raise the issue, given the fact it had not been objected to in trial, the looked at a four point analysis. First the court determined whether the error suggested a constitutional issue. Than the court must determine whether the right is a manifest constitutional right. There than has to be a showing that the outcome of the trial would have been different, had the error not occurred. Finally, there has to be a showing that the right or rights were affected. In the facts of the Jones, supra case, the court found no constitutional error. See also State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). That case dealt with a failure to define knowledge as used in the accompis liability instruction. The court went

through the analysis discussed in Jones, supra, and decided that there was no constitutional error. That was because the instructions did contain all of the elements. In that case failure to object was fatal to raising the issue on appeal. The same analysis applies in civil cases, as evidenced in Haueter v. Cowles Publishing Co., 61 Wn. App. 572, 811 P.2d 231 (1991). In that case, the court examined the proper standard for proof on appeal, even though no issue had been raised in the trial court.

In applying this to the case at bar, there clearly is a manifest constitutional issue. For the reasons discussed above and more thoroughly in the Amicus Brief, there clearly is a manifest constitutional issue that should be reviewed given the violation of the privilege and immunities clause. It clearly affected the outcome of the Appellant's case; it closed the door to the courthouse on the Appellant. It did so, by burdening her right to seek redress in the courts, solely because the legislature chose to grant medical providers, a class of private citizens, additional roadblocks to prevent claims from being brought against them. For those reasons, Ms. Waples should have her opportunity to have this claim heard.

In response to the other Amicus Brief, from the Washington defense Trial Lawyers, it appears that their main point is that if you put the word "crisis" in front of the issue, anything should be allowed. That is somewhat of an exaggeration, but not much of one.

3. RCW 7.70.150 is unconstitutional in light of Putman v. Wenatchee Valley Med. Ctr., 80888-1, decided by this court on September 17, 2009.
Subsequent to the granting of review, this court has decided the constitutionality of RCW 7.70.150. Nothing has been demonstrated in this case why that decision should be altered.

F. CONCLUSION

Therefore, for the reasons given in this response brief, this court should allow the privilege and immunities claims proceed and reverse the Court of Appeals and the Pierce County Superior Court.

DATED This 2nd Day of October, 2009.

RESPECTFULLY SUBMITTED,



George A. Steele #13749
Attorney for Appellant